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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CYNTHIA A. EMIDIO, Plaintiff and Appellant, v. JOHN K. MARTIN, Defendant and Respondent.	D054503 (Super. Ct. No. DN112643)

APPEAL from orders of the Superior Court of San Diego County, Eugenia A. Eyherabide, Judge. Affirmed.

Cynthia A. Emidio seeks review of family court orders that have resulted in her losing physical custody of her son, Dante, to Dante's father, her former husband, John K. Martin. Dante has special needs and Cynthia believes she is the better parent to provide for his needs and to care for him.

In the opinion we address the numerous contentions Cynthia raises in her appeal. As we shall explain, we do not find merit to her arguments, and substantial evidence

supports the orders considered in the appeal. In her arguments Cynthia stresses her disagreements with an Evidence Code section 730 evaluation the court ordered on the matters of custody and visitation. However, Cynthia stipulated to the evaluation about which she now complains. Moreover, the evaluation was never completed and, thus, the court did not rely upon it when making custody and visitation orders. Also, the court considered Cynthia's problems in paying for the evaluation and accordingly made accommodations for payment.

For similar reasons, Cynthia's argument the court failed to comply with California Rules of Court and with requirements regarding the filing of proper forms also fails. While we expect trial courts to comply with all applicable rules and to use required forms, because Cynthia stipulated to the appointment of the child custody evaluator, her argument is of no assistance to her here.

Cynthia's notice of appeal states she appeals orders from a May 13, 2008 hearing. At that hearing the family court confirmed temporary custody and visitation orders made at a hearing on November 30, 2007, which removed primary physical custody of Dante from Cynthia and awarded primary physical custody to John. Because the court designated the November 30 orders as temporary orders and later confirmed them at the May 13 hearing, we consider her contentions regarding the orders from both hearings in this opinion. In doing so, we hold substantial evidence supports the court's orders.

Cynthia also raises grievances that concern court rulings and orders made at other hearings. She either did not object to the rulings at the time they were made or did not file timely appeals challenging them. This court cannot consider her arguments that arise

from court decisions from which an appeal might earlier have been taken, but was not. (Code Civ. Proc., § 906.) We also do not have authority to consider orders issued after the May 13, 2008, hearing from which Cynthia has appealed. We affirm the orders made at the May 13, 2008 hearing.

FACTUAL AND PROCEDURAL BACKGROUND

Cynthia and John were married in 1992. Dante was born in September 1996. The marriage was dissolved on June 12, 2000. The judgment of dissolution granted Cynthia and John joint legal custody of Dante and granted Cynthia sole physical custody. John was granted visitation upon proof of his enrollment in and attendance at an anger management program, and he was ordered to complete 52 weeks of domestic violence/anger management classes. Cynthia was ordered to attend a counseling program dealing with domestic violence.

On June 20, 2002, Cynthia claimed John had hit Dante and requested he have no more visits. The court ordered Cynthia and John to follow a parenting schedule recommended by the psychologist who had evaluated Dante and by the family court services counselor. It also ordered them to attend parenting classes and for Dante to be evaluated for depression, bipolar disorder and attention deficit disorder.

In February 2005 Cynthia requested she and Dante be allowed to move to the east coast, where members of her family lived and she claimed she had opportunity for better employment. The family court services counselor recommended against the move, reasoning Dante's disabilities, including his physical and developmental delays and random violent behavior, could make it difficult for him to adjust to a new environment.

The counselor recommended Dante's primary physical residence be with John. Cynthia did not pursue her request to move.

In November 2006 Cynthia again requested she be allowed to move to the east coast with Dante. John opposed her request and asked for primary custody. On February 5, 2007, the family court services counselor recommended against the move and recommended Dante spend 75 percent of his time with John and 25 percent of his time with Cynthia because John might be able to offer a more predictable and structured environment.

On February 14, 2007, the court ruled the current custody and visitation orders would remain in effect and continued the matter to allow the family court services counselor to receive information from Dante's therapist and for the counselor to provide the court with an updated report. Subsequently, the counselor submitted the report. In the report, she said Dante's therapist had observed Dante had a much closer attachment to Cynthia than to John and did not want to live full-time with John.

On April 11, 2007, Cynthia moved to dismiss the action regarding her request to move away. She said the move was no longer feasible because her father had died, there were attendant family circumstances and the employment opportunity she had expected was not available. Cynthia argued her move-away request was now moot and she requested dismissal of all pending actions. She argued she had had continued physical custody of Dante for eight years, and that John had not shown a substantial change of circumstances to justify a change of custody. On May 3 Cynthia applied to continue the action and to place the case on the case management calendar. She requested setting a

trial and argued that having a full trial would entitle her to a formal statement of decision. She also requested attorney fees.

The court continued the case to June 22, 2007. Cynthia filed requests for disclosure of Dante's therapist's report, for judicial notice of certain documents and for lodgment of others and indicated her intent to take oral testimony at the June 22 hearing.

On June 22, 2007, during discussion related to Cynthia's request to have Dante's therapist testify, the court noted communications between Dante and his therapist were privileged and the privilege could not be waived by Cynthia or by John. The court appointed Darlene Anderson as minor's counsel to represent Dante and continued the matter to allow Anderson to investigate and provide recommendations.

At a hearing on October 29, 2007, the court accepted the parties' stipulations as read into the record and appointed Dr. Linda Altes to evaluate custody and visitation matters under Evidence Code section 730. The court ruled each party would pay half of the cost of the evaluation.

The family court services counselor and Anderson recommended Dante spend 75 percent of his time with John and 25 percent with Cynthia. On November 30, 2007, as a temporary order, the court adopted the family court services counselor's and Anderson's recommendations on the condition Dante not change schools. The court also ordered Dr. Altes to begin the Evidence Code section 730 evaluation immediately, John to pay the initial $2,500, which was half the cost of the evaluation, and Cynthia to pay the balance when the evaluation was completed.

On May 8, 2008, Dr. Altes informed the court she had stopped working on the evaluation because, although John had paid his share, Cynthia was not able to pay her part of the cost. On the same date Cynthia moved to remove Anderson as minor's counsel.

At the hearing on May 13, 2008, John's attorney represented that Dr. Altes had not finished the evaluation the court had ordered because Cynthia said she could not afford to pay her share, she was having problems with her eyes, and she did not believe her frame of mind would result in a valid evaluation. John's attorney stated Dr. Altes suggested Dante have a complete psychological evaluation and that the current temporary orders regarding custody and visitation remain the orders of the court. When the court asked Cynthia whether she would participate in a psychological examination as required for the evaluation, Cynthia answered, "At this time, no." The court ruled it would appoint a different evaluator to perform a psychological assessment of Dante and would not ask Dr. Altes to complete her evaluation. The court ruled the temporary custody orders issued on November 30, 2007, would become the orders of the court.

DISCUSSION

Cynthia appeals the orders made at the May 13, 2008, hearing that confirmed the custody and visitation orders made at the November 30, 2007 hearing. She asserts she was wrongly denied her right to an evidentiary trial at the June 22, 2007 hearing, the court erroneously relied on reports by the family court services counselor and minor's counsel, and John did not establish a change of circumstances justifying a change in custody. She contends minor's counsel's opinions and testimony are not admissible

evidence, and the court erred by conditioning custody on an evaluation which she could not afford and which was a violation of her privacy. These contentions are unsupported. Substantial evidence supports the court's orders concerning custody and visitation. As to Cynthia's argument regarding the evaluation, she stipulated to the evaluation at an earlier hearing and did not seek timely appellate review of the orders from that hearing.

I. Standards of Review

In her opening brief, under the heading "Statement of Appealability," Cynthia initially indicates she seeks de novo review of the family court's child custody rulings. De novo review is appropriate for questions of law that do not involve resolution of disputed facts. (*Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1025.) Cynthia has not raised any issues of law. The questions she presents are appropriately considered under the standards of whether the rulings demonstrate an abuse of the court's discretion or whether they are supported by substantial evidence. When the trial court has discretionary power to decide an issue, the reviewing court will not disturb the court's exercise of discretion unless it has been abused. "[T]he appellate court may not substitute its own view as to the proper decision." (*San Bernardino City Unified School Dist. V. Superior* Court (1987) 190 Cal.App.3d 233, 241.) Under the substantial evidence test, "we are bound by the 'elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted' to support the findings below. [Citation.]" (*SFPP v. Burlington Northern and Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462.) When the reviewing court considers the issues presented, the

lower court's ruling is presumed to be correct, and the appellant has the burden to show error by an adequate record. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

II. Cynthia's Issues and Questions Presented

Cynthia presents the following five issues and questions under the heading, "What Is At Issue And Questions Presented."

> "1. Did the trial court commit reversible error when it accepted unverified reports with no offers of proof and denied cross examination of those reports to the appellant and removed long-term child custody without requiring the substantial change of circumstances to be overcome?
>
> "2. Did the trial court commit reversible error when minor's counsel submitted non-verified reports before the court, and was allowed to be immune from hearsay and evidence rules that did cause harm to the appellant and her right to parent?
>
> "3. Did the trial court commit reversible error when she conditioned child custody on a psychological evaluation that was not certified by the San Diego Superior Court by the Judicial Council mandatory form of FL-326?
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> "4. Did the trial court commit reversible error when she failed to consider appellant's ability to pay for the evaluation when appellant had been determined indigent status?
>
> "5. Did the trial court commit reversible error when appellant's legal right to parent was removed in an ex parte without evidence and an adequate factual basis being established?"

Because Cynthia offers no argument, legal authority or citations to the record regarding these issues and questions presented in this portion of her opening brief, we do not discuss them here, but will refer to them when they relate to her arguments in the next section, which she has entitled, "Legal Discussion."

III. Legal Discussion

A

Cynthia asserts the trial court committed fundamental reversible error when it denied her right to the evidentiary trial and shifted authority to family court services. Under this argument, she also argues declarations are not evidence as they do not adhere to the secondary evidence rule; the recommendations of custody by family court services violated principles of well-settled case law; and family court services lacks the legal capacity to make any legal findings as it relates to the fundamental right to parent.

These contentions appear to be related to Cynthia's first issue stated above: "Did the trial court commit reversible error when it accepted unverified reports with no offers of proof and denied cross[-]examination of those reports to the appellant and removed long-term child custody without requiring the substantial change of circumstances to be overcome?"

In her briefs Cynthia connects these arguments to hearings held on June 22, 2007, and November 30, 2007. Cynthia was represented by counsel at these hearings, but the record does not indicate she raised any objections to the family court services report. "A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221-222.) Cynthia's argument that she was denied a full trial at the hearing on June 22, 2007, and thus all postjudgment orders are reviewable de novo is totally without merit. As to her claim regarding family court services making legal findings, the record does not show family court services made any legal findings. The record shows the

family court relied upon the substantial evidence before it to make well-reasoned orders for custody and visitation. Cynthia's arguments are unsupported.

Cynthia claims it was error for the court to consider a family court services unverified report that was used only for the move-away issue. She claims her ex parte motion to remove her request to move away from California with Dante rendered moot "all Family Court Services . . . as F[amily] C[ourt] S[ervices] was used only for the purpose of the moveaway, which was not based upon the law." This argument lacks any legal support. Cynthia's withdrawal of her request to move away did not void the family court services counselor's report, and the court did not rule it was invalid or eliminate it from consideration. It remained a factor for the court to consider.

Cynthia also argues under this heading that John could not establish a change of circumstances, which she claims the law requires in order for there to be a change of custody orders. Cynthia is incorrect. Substantial evidence of changed circumstances was presented at the November 30, 2007, hearing to justify a change in physical custody orders.

The family court services counselor recommended John have primary physical custody of Dante because Cynthia appeared to be having difficulty in providing for his needs, and John might be able to provide a more structured and predictable environment. In the family court services report dated February 5, 2007, the counselor recommended Cynthia and John continue to share joint legal custody, but that John have primary physical custody. The counselor expressed concern about Cynthia's ability to meet Dante's needs on an ongoing basis. She said the child protective services worker had

reported that Cynthia locked Dante out of the home when his behavior was out of control, and Dante appeared well adjusted and content in John's home.

Minor's counsel Anderson reported to the court that she had reviewed the reports and met with Cynthia and her attorney; John and his attorney; John's wife; a representative of the child protective agency; Dante's therapist, teacher and school principal; and the evaluator, Dr. Altes. She stated Cynthia and John were diametrically opposed with regard to Dante's needs, and Dante's therapist and the child protective agency also held opposing views. She said the school officials reported Dante's aggressive behavior had increased in intensity, but it had not increased in frequency, and his frustrations were related to being in unstructured situations. She recommended Dante reside primarily with John, opining he would benefit from living in a more structured environment. She stated it was expected the parties would cooperate in an evaluation to determine the best situation for Dante.

The reports from the family court services counselor and Anderson constitute substantial evidence to support finding there had been a change of circumstances and Dante's best interests would be better served by a custody order granting primary physical custody to John.[1] By the time of the May 13, 2008 hearing, because Cynthia had not

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1 Cynthia's reliance on *Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371 is misplaced. There, the court stated when it has been determined that a particular custodial arrangement is in the child's best interests, the court should preserve that mode of custody unless a change of circumstances indicates a different arrangement would be in the child's best interests. (*Id.* at p. 1379.) Here, substantial evidence was presented to show there

participated in the court-ordered Evidence Code section 730 evaluation, the court had no further information before it to indicate that it should make a different custody and visitation order. Cynthia has not shown error by the court ruling the November 30, 2007, orders would remain the orders of the court.

B

Cynthia contends the court prejudicially erred by accepting Anderson's report. This argument relates to Cynthia's second issue presented above: "Did the trial court commit reversible error when minor's counsel submitted non-verified reports before the court, and was allowed to be immune from hearsay and evidence rules that did cause harm to the appellant and her right to parent?" Cynthia argues the court accepted an unverified hearsay report from Anderson and used it in conjunction with an unverified family court services report to deny her custody of Dante. She claims Anderson consulted with the court-appointed evaluator in violation of Family Code section 216, complains she was denied her right to cross-examine Anderson at the June 22, 2007 hearing and objects that Anderson never consulted with Dante. Cynthia claims Dante wanted to live with her, but Anderson never presented his position for the court's consideration.

Cynthia has not shown the court improperly considered any unauthorized reports or that Anderson did not properly represent Dante's interests. Anderson met with the individuals who would have had relevant information to impart, and she consulted the

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had been a change of circumstances and Dante's interests would be better served by granting John primary physical custody.

documents provided by the parties, including a letter from Dante's therapist and family court services reports dated February 5, 2007, and April 25, 2007. She stated she did not meet with Dante because of his age, his learning and language processing disabilities and his emotional difficulties. She also said both parents had told her Dante tended to repeat whatever was just told to him. Anderson based her report to the court on her interviews and the relevant documents provided by the parties and gave a thoughtful and reasoned recommendation. Cynthia has not shown error by the court's reliance on the reports and the recommendations by family court services and Anderson.

This court is without authority to consider Cynthia's argument that the court violated her rights by not accepting testimony by Dante's therapist. The court ruled it would not allow the therapist to testify at the June 22, 2007 hearing. Cynthia did not timely file an appeal from the orders at that hearing. Thus, they are not at issue for this appeal. (Code Civ. Proc., § 906.) Moreover, Dante's communications with his therapist were privileged and his court-appointed attorney did not waive the privilege. (Evid. Code, § 1014.) The court did not err by not allowing Dante's therapist to testify or by refusing to accept the documents regarding her proposed testimony.

C

Cynthia next argues the court erred by conditioning custody on an Evidence Code section 730 evaluation and by not taking into consideration her inability to pay for the evaluation. These arguments relate to her third and fourth issues: "Did the trial court commit reversible error when she conditioned child custody on a psychological evaluation that was not certified by the San Diego Superior Court by the Judicial Council

mandatory form of FL-326?" and "Did the trial court commit reversible error when she failed to consider appellant's ability to pay for the evaluation when appellant had been determined indigent status?" Cynthia also claims the evaluation placed an unwarranted intrusion on her right to privacy.

Evidence Code section 730 states as follows:

> "When it appears to the court, at any time before or during the trial of the action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion, or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required."

The record shows that on October 29, 2007, the court accepted the parties' stipulations and ordered Dr. Linda Altes to complete an Evidence Code section 730 evaluation on custody and visitation and for each party to pay half of the cost of the evaluation. Cynthia was present at the October 29 hearing and was represented by counsel when the stipulation to the appointment of Dr. Altes as the evaluator was read into the record. She cannot be heard to complain about the court's authorization of the evaluation to which she stipulated.

In a separate motion, Cynthia requests this court take judicial notice of the following: California Rules of Court, rules 5.220, 5.225 and 5.230; Judicial Counsel Forms Fl-325, FL-326 and FL-327; the complete family court file regarding this case to show that form FL-326 is missing from the file; a new form process for child custody evaluators dated July 2009; a television news article; and the contract between Dr. Altes and Cynthia.

Cynthia's request for judicial notice relates to her claim that the family law court does not adhere to requirements regarding child custody evaluators. We assume our family courts seek to ensure compliance with all California Rules of Court relating to child custody evaluators and further ensure that all required forms are made a part of the court file. Here, Cynthia stipulated to the appointment of a child custody evaluator. Thus, her argument regarding the proper forms to be used does not provide assistance to her claim. The request for judicial notice is denied.

Moreover, the court clearly was authorized to order the evaluation since Dante is a child with special needs, and Cynthia and John presented diametrically opposed views on what was in his best interests and which of them should have primary physical custody. Cynthia has not shown an evaluation would have been an unwarranted intrusion on her right to privacy. Further, the court did take into account Cynthia's inability to pay for the evaluation. It acknowledged that evaluations are expensive and commented that, if necessary, it would ask John to pay for the evaluation and then have Cynthia repay him. Also, Dr. Altes indicated Cynthia was not willing to take a psychological examination, not only because of the cost, but also because she was having problems with her eyes and she believed the test would not produce valid results because she was so angry. As to Cynthia's additional statements under this subsection that the court commented it did not have jurisdiction over Dante's school or his individual education plan, we are unable to discern a legal argument from these statements.

D

Cynthia additionally asserts it was prejudicial error for the court to remove legal custody and violate her right to parent in an abbreviated ex parte hearing. This argument relates to her fifth issue: "Did the trial court commit reversible error when appellant's legal right to parent was removed in an ex parte without evidence and an adequate factual basis being established?" Cynthia bases this argument on a hearing held on November 20, 2008, well after the May 13, 2008 hearing from which she has appealed. It cannot be subject to the court's review in this appeal.

E

Cynthia's next argues the court erred by denying her motion to disqualify Judge Eyherabide. This issue also cannot be considered in this appeal. Cynthia filed her motion to disqualify Judge Eyherabide several months after the May 13, 2008 hearing. This court does not have authority to consider the ruling regarding this issue in this appeal.

F

John suggests Cynthia should be sanctioned for filing a frivolous appeal and he should be granted attorney fees. Code of Civil Procedure section 907 provides "[w]hen it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." An appeal is frivolous "only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any

reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) However, "[a]n appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals ." (*Ibid.*) Courts should employ sanctions sparingly to deter only the most egregious conduct. (*Cox v. County of San Diego* (1991) 233 Cal.App.3d 300, 314, disapproved on a different ground in *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925, fn. 8.) Although Cynthia has not brought forth any meritorious issues, we decline to exercise our discretion to impose sanctions and award attorney fees.

DISPOSITION

The May 13, 2008 orders confirming the November 30, 2007 custody and visitation orders are affirmed. John is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278.)

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

HALLER, J.